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In the Supreme Court of the United States

OCTOBER TERM, 1977

J. L. SIMMONS COMPANY, INC., ET AL., PETITIONERS

v.

STATE OF ILLINOIS AND JOHN E. SARBAUGH, CHIEF, MIDWEST OFFICE, ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT SARBAUGH IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 552 F. 2d 768. The opinion of the district court (Pet. App. B1-B21) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 8, 1977. The petition for a writ of certiorari was filed on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether grand jury testimony of an indicted corporate antitrust defendant's officers and employees, which the government furnished to the firm under Federal Rule of Criminal Procedure 16(a)(1)(A), is discoverable, after the criminal proceedings have terminated, by a civil plaintiff who proposed to call the officers and employees as witnesses at trial or in depositions.

2. Whether an order by a district court denying a request for disclosure of grand jury transcripts for use in a related civil antitrust proceeding in a different district court is a final appealable order under 28 U.S.C. 1291.

STATUTE AND RULES INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Federal Rule of Criminal Procedure 6(e) provides in part:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

Federal Rule of Criminal Procedure 16(a)(1)(A) provides in part:

> * * * Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

STATEMENT

In December 1972 a grand jury convened in the United States District Court for the Eastern District of Illinois indicted nine corporations and four individuals for submitting rigged bids to the State of Illinois for highway construction in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. During the criminal proceedings the government was ordered, pursuant to Fed. R. Crim. P. 16(a)(1)(A), to provide each corporate defendant, upon request, with a copy of the grand jury transcript of any of its present or former employees

whose testimony could legally bind the defendant for the alleged illegal activities. Some disclosure was made pursuant to that order. All the criminal defendants pleaded *nolo contendere*, fines were imposed, the grand jury was discharged, and all criminal proceedings have been completed. *United States* v. *Champaign Asphalt Company*, CR 72-67-D (E.D. Ill.) (Pet. App. A2, B1-B2).

In November 1973 the State of Illinois filed in the United States District Court for the Southern District of Illinois an antitrust damage suit against the nine corporate defendants in the criminal action and five additional highway contractors, based on the same antitrust violations (Pet. App. A3, B2). The State then petitioned the Eastern District for an order requiring the Chief of the Antitrust Division's Midwest Office (respondent Sarbaugh) to produce grand jury transcripts that had been disclosed to any defendants in the criminal proceedings (Pet. App. A3). Sarbaugh filed a response interposing no objection to the requested production (Pet. App. A5). The district court denied production, finding that the State had failed to establish a compelling need for grand jury materials (Pet. App. B19).

On the State's appeal, the court of appeals unanimously reversed. It held (1) that the district court's order refusing to allow discovery was appealable as a final order under 28 U.S.C. 1291 (Pet. App. A8-A9), and (2) that grand jury materials previously disclosed to the corporate defendants should be furnished to civil plaintiffs who have called the grand jury witnesses to testify at trial or in depositions (Pet. App. A16).[1]

[1]The court also held that the corporate defendants had been properly permitted to intervene in the proceeding against Sarbaugh (Pet. App. A5-A8).

The court declined to hold that disclosure to the corporate defendant eliminates the requirement that particularized need be shown (Pet. App. A13). It ruled that even though the criminal proceedings were terminated, "residual secrecy" for the disclosed testimony was necessary because of the corporation's right to disclosure under Federal Rules of Criminal Procedure 16(a)(1)(A), and the unlikelihood that a corporation would reveal the grand jury testimony except to the extent necessary for its criminal defense (*ibid.*). The court held, however, that the level of particularized need necessary to overcome this residual secrecy was diminished by disclosure to the corporate employer of the witnesses' testimony (Pet. App. A10-A12). Noting that particularized need requirements are usually satisfied when a grand jury witness testifies at trial, but that judges should not have to determine whether trial and grand jury testimony is inconsistent (Pet. App. A13-A15), the court concluded (Pet. App. A16):

> * * * a particularized need for * * * limited disclosure * * * is sufficiently shown if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript, and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury.[2]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other

[2]The court further ruled that the limited disclosure it authorized must be restricted to a single attorney for the plaintiff who is required to keep a record showing "to whom and when each transcript or portion thereof" has been disclosed (Pet. App. A16). The transcripts may not be copied, and they must be returned when they are no longer needed for the prescribed use; and any defendant may bar any disclosure of any portion of the transcript that is not relevant to the issues in the civil litigation (Pet. App. A16-A17).

court of appeals, and raises no issue warranting further review.

1. a. Contrary to petitioners' contention, the decision below does not conflict with *State of Texas* v. *United States Steel Corp.*, 546 F. 2d 626 (C.A. 5), petition for a writ of certiorari pending, No. 76-1710.

In *State of Texas,* a federal grand jury indicted nine companies for price fixing and other violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. All the criminal defendants pleaded *nolo contendere*. During the criminal proceeding the corporate defendants obtained the grand jury testimony of their employees pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The State of Texas filed a civil antitrust action against the same companies based upon the same conduct and sought the production of the employee grand jury testimony previously disclosed to the corporate defendants. The district court granted a motion to compel production and certified the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). *State of Texas, supra,* 546 F. 2d at 628.

The court of appeals reversed. It stated that "the issue presented is whether the State of Texas must show a particularized need to obtain the grand jury documents from the defendants and, if so, whether it has made that showing in this case" (546 F. 2d at 628). It held that particularized need must be shown, and that Texas had not shown that need because

> [t]he general circumstance that another party has his own or his employees' transcript in his possession does not, standing alone, establish particularized need sufficient to overcome the need for grand jury secrecy. [*Id.* at 631.]

In the present case the court of appeals similarly held that particularized need must be shown (Pet. App. A13).

It ruled, however, that that need could be shown if the State of Illinois could demonstrate not only that the corporate defendants had copies of their employees' grand jury testimony, but that those employees were "scheduled to be called to give testimony either at trial or by deposition on the matters about which [they] testified before the grand jury" (Pet. App. A16).

In arguing that there is a conflict between the decision below and that of the Fifth Circuit in *State of Texas,* petitioners ignore the critical fact that the Seventh Circuit permitted disclosure only because of the additional factor, not invoked in *State of Texas,* that the witnesses whose grand jury testimony was sought would be called to testify at trial or deposition. In contrast, the Fifth Circuit held only that the fact that the corporate defendants had copies of their employees' testimony was not enough to show particularized need. Nothing in the Fifth Circuit's decision indicates that if the additional factor upon which the Seventh Circuit relied in this case had been presented to the Fifth Circuit, that court would have denied production.[3]

b. The decision below does not involve any novel holding or any departure from prior law, and does not open the grand jury door wider than the existing particularized need standard permits, given Fed. R. Crim. P. 16(a)(1)(A). Cf. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400. Since the secrecy required by Fed. R. Crim. P.

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[3]Petitioners also contend (Pet. 11) that the decision below conflicts with that of the Second Circuit in *Baker* v. *United States Steel Corporation,* 492 F. 2d 1074. As petitioners recognize (Pet. 11), however, the ruling "with respect to the disclosure of grand jury transcripts may technically be labeled as *dicta.*" An asserted conflict between a holding by one circuit and a *dictum* by another does not require resolution by this Court. Stern and Gressman, *Supreme Court Practice* § 4.3 (4th ed., 1969).

6(e) protects the identity of witnesses testifying before the grand jury, civil antitrust plaintiffs ordinarily will have to decide whether to call such persons for trial or deposition without knowing whether they had been grand jury witnesses. Only then may their grand jury testimony, as previously furnished to the corporate defendants, become available under the decision below. It is settled that the grand jury testimony of trial witnesses (*United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682) and deponents (*Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (C.A. 2); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F.R.D. 37, 42 (N.D. Ill.)) may be disclosed under the particularized need standard (cf. *Dennis* v. *United States*, 384 U.S. 855, 870, n. 15). There is no need for this Court to consider the application of that principle to the particular facts here.

2. The court of appeals correctly held that the order of the district court denying disclosure was appealable under 28 U.S.C. 1291. The court noted that the district court's order "'disposes of the contentions of all the parties, leaving nothing else to be decided, * * * [and] ends the controversy before'" the court (Pet. App. A9). The proceedings before the district court constituted an independent action for the production of grand jury materials against an official of the Antitrust Division, invoking Rule 6(e) of the Federal Rules of Criminal Procedure. The district court order, which terminated that proceeding, is final under 28 U.S.C. 1291.

Although the Seventh Circuit indicated that its rationale did not appear to be in harmony with that of the Second Circuit in *Baker* v. *United States Steel Corporation*, 492 F. 2d 1074 (Pet. App. A17), there is no conflict. *Baker* involved an appeal from an order granting discovery entered by the district court in which the civil antitrust action was pending. The Second Circuit left open the

question the Seventh Circuit here decided, when it stated: "We are not here dealing with an order of a different district court *denying access to the transcripts*, which conceivably could be directly or separately reviewable as a final order * * *" (*Baker, supra*, 492 F. 2d at 1078; emphasis in original).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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